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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,

Petitioner,

v.

JULIUS MULLINS, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *AMICUS CURIAE*

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BRIEF OF INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, *AMICUS CURIAE*

THE INTEREST OF THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

The International Union, United Mine Workers of America (hereinafter "UMWA"), is the collective bargaining agent for approximately 160,000 members employed in coal mines covered by collective bargaining agreements in the bituminous coal industry. As such, it negotiated, and is a party to, the National Bituminous Coal Wage Agreement of 1974 (hereinafter "1974 Agreement"), the agreement under which the Trustees of the UMWA Health and Retirement Funds (hereinafter "Trustees") seek herein to collect royalties due the Funds under the "purchase-of-coal clause" in the 1974 Agreement.

The interest of the UMWA in this litigation, prompting the filing of this brief, amicus curiae, supporting the respondents

Trustees, is UMWA's deep and continuing interest in safeguarding the integrity of all collective bargaining agreements executed by it on behalf of its members. UMWA has sought for many years to protect its members from the ever-encroaching evils and practices of signatory operators subcontracting coal lands and coal-producing facilities and purchasing coal from nonsignatory operators, which undermine its members' tenure of employment, wage standards, fringe benefits, and other working conditions set forth in UMWA's national agreements.[1] The "purchase-of-coal clause" at issue here is but one of many clauses which the UMWA has, over the years, negotiated to seek this objective. UMWA must protect its members from the practice of operators who, after UMWA has bargained for this clause, violate their bargaining commitments and seek financial windfalls at their employees' expense. The "purchase-of-coal clause" requires royalties to be paid into the Benefit and Pension Funds established in 1950, the first multiemployer funds of their kind in the United States. Billions of dollars have been paid to the beneficiaries of these Funds. More than 100,000 coal mining families are being served by the 1950 and 1974 Funds. Presently, approximately 70,000 miners are receiving pensions from the 1950 Pension Trust, while approximately 14,000 are receiving pensions from the 1974 Pension Trust. The 1950 Benefits Trust had approximately 190,000 beneficiaries in 1980. These benefits are based upon an industry-wide concept, with pension benefits paid after specified service *in the industry*, not just service for a *single employer*.[2]

[1] Language in *UMWA* v. *Coronado Coal Co.*, 259 U.S. 344, 396 (1922), demonstrates it as one arising out of a subcontract for just such a purpose. The Bituminous Coal Operators Association has also expressed concern in another setting regarding the effect on their sector of the coal industry caused by possible cost differentials arising out of the UMWA Funds. See n. 31 *infra*.

[2] The 1950 Funds, for instance, support almost 20,000 retirees, who may have as little as five (5) years of signatory service, so long as they have a total of twenty (20) years of total coal mine employment. 96 CONG. REC. S10,105 (daily ed. July 29, 1980) (remarks of Sen. Randolph).

The cost of the 1950 Funds and the 1974 Funds represents the *single* largest cost differential between UMWA mines and nonsignatory mines. The reason for this differential is that pension plans, if any, of nonsignatories cover only employees and retirees of the single employer and their years of qualified service are based only on the service of the single employer. Few, if any, ever achieve the required years of service necessary to qualify for pension benefits. In addition, these plans often do not include medical payments to already retired miners, as do the UMWA Funds. Thus, the royalty on purchased coal, which is equivalent to the royalty paid on coal produced for sale or use, reasonably represents the differential in labor costs between mines under the Agreement and those not. C.A.J.A. 568, 572.[3] UMWA's interest is to protect those beneficiaries already retired and the employee-members now receiving health benefits and gaining service credit at all bituminous mines. By this negotiated and agreed payment on purchased coal, UMWA has thus increased and enhanced the ability of the Funds to pay the benefits then available and perhaps in the future to increase and expand them.

STATEMENT OF THE CASE

The Trustees brought suit against the Kaiser Steel Corporation (hereinafter "Kaiser") seeking payment of contributions due these Funds under the terms of the 1974 Agreement. The 1974 Agreement was first negotiated between UMWA and the Bituminous Coal Operators Association (hereinafter "BCOA"), a multiemployer bargaining unit. Kaiser, as a member of BCOA, became a signatory operator to the 1974 Agreement. As part of that Agreement, Article XX(d)(v) provided that a signatory operator pay a specified royalty on each ton of coal procured or acquired for sale or use for which no contribution had been made to the appropriate Trusts, as

[3] References to appendices to the Petition for Certiorari are cited as "Pet. App. ____"; references to Joint Appendix filed herein are cited as "J.A. ____"; references to Joint Appendix filed in the Court of Appeals are cited as "C.A.J.A. ____."

provided for in Article XX. The amount of the royalty to be paid was calculated by the negotiators to be an amount equal to what the signatory operator would have paid if the operator had produced the coal at its own mines. J.A. 31.

The Trustees brought suit against Kaiser for failure to pay into the Funds the required royalty for coal purchased from employers for which no royalty contribution had been paid.

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's granting of the Trustees' Motion for Summary Judgment. Kaiser's principal defense was that Article XX(d)(v), commonly referred to as the "coal-purchasing clause," was illegal under the federal antitrust laws[4] and Section 8(e) of the National Labor Relations Act, as amended (hereinafter "Section 8(e)").[5] The Circuit Court affirmed the District Court's holding that Kaiser "was not entitled to interpose the illegality defense." *Mullins v. Kaiser Steel Corp.*, 642 F.2d 1302, 1308 (D.C. Cir. 1980).

History of the Dispute

It is not contested that many signatory operators sought to avoid the terms of the collective bargaining agreements they negotiated with UMWA by the practice of subcontracting their coal lands and coal mines to nonsignatory operators with the agreement that the signatory operators had the right to purchase the coal. If UMWA would permit, a signatory operator could avoid its collective bargaining obligations by shutting down its mines, limiting production, and subcontracting its mining facilities or coal lands to nonsignatory operators and supplying its customers with coal purchased from these nonsignatories. The signatory operators could also accomplish the same result by purchasing coal from operators who were not subcontractors. The concern of the UMWA with this practice has been reflected in its collective bargaining agreements for over forty years. *See Dixie Mining Co.*, 165 N.L.R.B. 467, 471

[4] Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2 (1976).

[5] Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §158(e)(1978).

(1967). All of the clauses inserted in agreements prior to 1958 failed to accomplish their objective, so in 1958 the UMWA negotiated into its National Agreement a provision entitled the "Protective Wage Clause" (hereinafter "PWC"). PWC provided, in essence, that the signatory operators agreed that all bituminous coal mined, produced, or prepared by them or acquired by them under a subcontracting arrangement shall be mined or produced under terms and conditions which are as favorable to the employees as those provided in the UMWA National Agreement.

PWC's effectiveness was destroyed in 1963 when the NLRB found that the clause violated Section 8(e). *Raymond O. Lewis*, 144 N.L.R.B. 228 (1963). Shortly thereafter, UMWA's National Agreement was amended (1964) to replace the PWC with a purchase-of-coal clause, which required a signatory operator to pay 80-cents into the UMWA Welfare and Retirement Fund on all coal purchased from nonsignatory operators, as compared with the royalty of 40-cents a ton on coal produced by the signatory operator.[6] This clause has been referred to as the "80-cent clause."

The "80-cent clause" was not included in the agreements covering the captive mines of the steel companies. The Board found the "80-cent clause" violative of Section 8(e) in a supplemental compliance determination in *Raymond O. Lewis*, 148 N.L.R.B. 249 (1964), and in an independent decision and order in a subsequent case, *Dixie Mining Co.*, 165 N.L.R.B. 467 (1967) (hereinafter the "80-cent cases"). Both the PWC and the 80-cent cases were brought before the Circuit Court of Appeals and both were remanded to the Board for further proceedings. *Lewis* v. *NLRB*, 350 F.2d 801 (D.C. Cir. 1965);

[6] Kaiser wrongfully characterizes the purchase-of-coal clause in the 1974 Agreement as a penalty clause which gives a signatory operator an advantage over nonsignatory operators who sell coal (Brief at 4 n.5), because the amount of royalty paid by a signatory operator who produces the coal is *equal to the amount of royalty paid on coal purchased. Prior* to the 1974 Agreement, the royalty on purchased coal was *double* the royalty on coal produced by signatory operators; hence, it was characterized as a penalty clause.

International Union, UMWA v. *NLRB*, 399 F.2d 977 (D.C. Cir. 1968).

After remand and further proceedings, the Board found that the PWC and the 80-cent clause had a lawful objective of preserving unit work and standards and did not contravene Section 8(e). The Board concluded that the "80-cent clause functions as a union standards clause in protecting and preserving the work of employees working under the UMWA agreement and the standards under which such work is performed by removing the economic incentive to subcontract such work stemming from the lower wage and fringe benefit costs of nonsignatory mines." *Dixie Mining Co.*, 188 N.L.R.B. 753, 754 (1971) (hereinafter "Dixie Mining (1971)"). Seven steel companies had sought to file exceptions to the Hearing Examiner's decision, but the Board denied the request because they were not parties to the proceedings. The Board determined that the steel companies' brief was in the nature of an amicus curiae brief and considered it on that basis. *Dixie Mining (1971), supra* at 753 n.3. The steel companies' brief asserted the 80-cent clause contravened Section 8(e).

When the *80-cent* case was again brought before the Circuit Court by the UMWA, the Circuit Court, acting on a motion of Dixie Mining Company, one of the independent operators that had challenged the clause, found that it did not have jurisdiction, since no aggrieved party had yet appealed from the Board's second decision, because the Circuit Court's "unqualified remand in this case operated to divest us of jurisdiction." Thus, UMWA's petition to review was denied.[7]

[7] The *PWC* and *80-cent* cases were consolidated for appeal. The Circuit Court held that the *PWC* case was moot because the Joint Industry Contract Committee, charged with the administration of the PWC, suspended operation of the PWC on November 4, 1959, one week before the effective date of Section 8(e), and had not enforced it since. Thus, the Circuit Court stated, "We therefore think the issue of the PWC's validity lacks the immediacy of a live controversy calling for judicial resolution." *Int'l Union, UMWA* v. *NLRB*, 468 F.2d 1139, 1141 (D.C. Cir. 1972) and *sub nom. U.S. Steel Corp.* v. *NLRB*, No. 73-1700 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 983 (1974).

Although the contracts of the steel companies did not contain the coal-purchasing clause in the 1964 and 1966 contracts, they agreed in 1968 that, if during the life of the agreement, all questions concerning the lawfulness of the 80-cent clause shall have been resolved in favor of such clause by the court of last resort, the captive operators "shall engage in good faith negotiations with you concerning what action may be appropriate between it and UMWA under the then existing circumstances." C.A.J.A. 473. Following the Board's decision in January 1971, all of the captive operators, including Kaiser, agreed to include the purchase-of-coal clause in the 1971 Agreement and it has been included in each succeeding agreement.[8]

Subsequently, when the Trustees discovered that U.S. Steel Corporation had failed to pay royalty due under the terms of the 1974 Agreement on purchased coal and failed to report such purchases to the Funds, U.S. Steel filed a suit against UMWA and the Trustees, making the same antitrust and Section 8(e) allegations as Kaiser does herein. The Trustees filed a counterclaim seeking payment of royalties due. *United States Steel Corp.* v. *International Union, UMWA*, Civil No. 75-1966 (D.D.C. 1977). In *U.S. Steel*, the District Court found that the purchase-of-coal clause did not violate the antitrust laws and also dismissed the complaint with prejudice because the parties agreed "that the remaining portion of plaintiff's complaint, which challenges the 'purchase-of-coal' clause as violating Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e), should be dismissed with prejudice," and that the Trustees' counterclaim was dismissed with prejudice, conditioned upon payment by U.S. Steel to the Trustees of "all royalties due under the purchase-of-coal clause of the 1974 Agreement." *Kaiser, supra* at 1312. A copy of the District Court's Order and the Memorandum of Agreement are attached hereto as Appendix A.

[8] The royalty on produced coal was increased in the 1971 Agreement. Likewise, the amount of royalty on purchased coal was also increased. While the UMWA prevailed in *Dixie Mining (1971), supra*, it attempted to get the "court of last resort" to also sanction the clause. *See* p. 6 and n.7, *supra*.

Subsequent thereto, as the Circuit Court pointed out in the instant case, "another employer signatory to the 1974 Agreement has previously charged that the purchase-of-coal clause violates Section 8(e), but the Board's General Counsel refused to issue a complaint. *International Union, UMWA (Consolidation Coal Co.)*, NLRB Case No. 6-CE-17 (March 28, 1979). The implication of this action is that the General Counsel did not regard the claim as 'sufficiently meritorious to warrant Board consideration.' *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975)." *Kaiser Steel supra* at 1308 n.5.

The purchase-of-coal clause has never been found to violate the antitrust laws, although it has been held that, even if legal, it can be used as evidence, along with other facts, to assert that UMWA and other large coal operators conspired to put small operators out of business, in violation of the antitrust laws. *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970).[9]

SUMMARY OF ARGUMENT

The issues before the Court are (1) whether a delinquent employer, Kaiser, who breached its voluntarily assumed obligations to pay health and retirement contributions to benefit plans on behalf of its employees, and who refuses to invoke its available NLRB remedies against the union, can require third party, neutral trustees to litigate the same labor law issues in a delinquency enforcement action; and (2) whether, in the same type of action, the employer may raise antitrust defenses more appropriately directed to the union. The courts below answered both questions in the negative. The UMWA respectfully asserts that those decisions were correct.

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[9] The purchase-of-coal clause was not considered in *UMWA* v. *Pennington*, 381 U.S. 657 (1965), nor in *Tennessee Consolidated Coal Co.* v. *UMWA*, 416 F.2d 1192 (6th Cir. 1969), *cert. denied*, 397 U.S. 964 (1970), as asserted in Kaiser's Brief at 5 n.8.

I. Public policy, as previously expressed by this Court and recently affirmed by Congress in enacting the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1001a (1981 Supp.), requires that employee benefit plan trustee delinquency collection actions not be complicated by extraneous labor law issues. This is particularly so when the contemplated labor law remedies against the proper party, the union, could have been, but were not invoked by the employer. By reversing the decision below, thereby granting jurisdiction to federal courts to consider, in the first instance, unfair labor practice questions in delinquency-collection actions, the Court may well force such trustee contract actions back into state courts, thwarting congressional intent to encourage a national pension policy. Furthermore, state courts have been denied jurisdiction over federal unfair labor practices, unless the *Board* cedes jurisdiction to them, an authority never exercised. 29 U.S.C. §164(c).

II. Even if Kaiser is permitted to raise a defense in federal or state court under Section 8(e), Kaiser has not sufficiently alleged facts on the issue to withstand a summary decision. The challenged provision, which is legal on its face, has not been shown to have been applied improperly herein.

III. Assuming *arguendo* a possible antitrust violation, such a defense is not applicable against neutral, third party trustees, in a contract enforcement action, nor is it applicable to "intelligible economic transactions," which the purchase-of-coal clause is, particularly when the defense would deny already-earned compensation to employees. As with the Section 8(e) defense, permitting the defense of illegality under the antitrust laws in trustee delinquency enforcement actions, which can also be brought in state courts, will unnecessarily raise the issue of whether or not a federal antitrust defense can be raised in a similar collection action before a state court.

Since the challenged provision deals with "wages, hours and other conditions of employment," absent a conspiracy by Kaiser and the BCOA with the UMWA, the purchase-of-coal clause is protected by the labor exemption to the antitrust acts. Kaiser has not sufficiently alleged facts regarding the

1974 Agreement negotiations that were conducted by newly-installed UMWA officers to withstand summary disposal of its conspiracy defense.

Since Kaiser can pursue its antitrust and labor actions against the proper party, the union, it should not be permitted to unnecessarily complicate what should be a simple delinquency-collection action by neutral, third party trustees. Reversal of the decision below will encourage litigation and delay collections, thereby adding further complexities, both short and long range, to the financial planning for employee benefit trusts. As this nation increasingly relies on its private pension system to protect its retired workers, such a result should not be sanctioned.

ARGUMENT

I. IN A CONTRACT ENFORCEMENT ACTION BY HEALTH AND RETIREMENT PLAN TRUSTEES, STATE COURTS AND FEDERAL COURTS, IN THE FIRST INSTANCE, DO NOT HAVE JURISDICTION TO DETERMINE WHETHER CONTRACTUAL PROVISIONS ARE UNFAIR LABOR PRACTICES

This Court has long recognized that interpreting and applying the National Labor Relations Act "is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review . . . ." by the federal courts. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Indeed, in applying the often "elusive" concept of secondary activity, *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-88 (1969), "courts should defer to the NLRB's understanding of the statute which it administers." *NLRB* v. *Pipefitters*, 429 U.S. 507, 528 (1977); *see Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303-04 (1977). "Accordingly, regardless of how (the Court) might have resolved the question as an initial matter, the appropriate weight . . . must be given to the judgment of the agency whose special duty (it) is to apply this broad statutory language to varying fact patterns . . .." *Bayside, supra* at 304.

This general rule of deferral to the Board makes it inappropriate to raise unfair labor practices as a defense to contract enforcement actions *by trustees* before federal or state courts. First, public policy dictates that neutral, third party health and retirement fund trustees should not be thrust into litigating difficult, often contentious, and complicated labor matters, when appropriate remedies exist against the proper party — the union.[10] Secondly, Congress, which has carefully crafted the remedies that are available against unions for secondary activities and hot cargo provisions, clearly limited federal courts, regarding enforcement of alleged Section 8(e) provisions, to injunctive relief initiated by the Board and review of Board orders. The Board should have the initial opportunity to apply the often "elusive" concepts of secondary activity to the broad range of fact patterns that can arise. Finally, after long debate, Congress refused to grant state courts jurisdiction over unfair labor practices, unless the NLRB specifically ceded such to them.[11] Yet, reversal of the opinion below could lead to that result, since trustee actions are often brought in state courts.

A. Congress And This Court Recognize, While Section 8(e) And Antitrust Actions Or Defenses May Be Raised Against The Union In The Proper Forums, That Overriding Public Policy Concerns Do Not Support Such Defenses In Trustee Enforcement Actions

Federal employee benefit and labor policies require that Kaiser raise its legal objection to the purchased-coal provision

[10] It should be noted that the really complex and controversial factual issues that would be necessary to resolve, if this case is remanded, particularly the contested factual issues, have not been litigated in this case. Compare, for example, Roger Haynes' and Donald Pierce's affidavits. Trustees should not be placed in the middle of such a dispute, nor should they be expected to argue what will normally be the union's position in such an action. 96 CONG. REC. H7899 (daily ed. Aug. 26, 1980) (remarks of Rep. Thompson). Nor are these questions appropriate for initial consideration by a court. They are properly raised before the Board. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 511 (1980).

[11] See, n. 25, *infra*.

against the proper party, the UMWA, rather than interject the Funds' Trustees into the often contentious and tortous litigation history of this provision and its predecessors. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Pennington* v. *UMWA*, 325 F.2d 804, 818 (6th Cir. 1963) *reversed in part* 381 U.S. 659 (1965), *cert. denied in relevant part sub nom. Pennington* v. *Lewis*, 381 U.S. 949 (1965). In reaffirming this policy, Congress, aware of the nation's increasing reliance on the private pension system, recently took note of the particular situation facing this Court:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. *Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions.* This should *not* be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law* — other than 29 U.S.C. 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions *not be permitted to repudiate their pension promises.*
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> In this regard we endorse judicial decisions such as *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962); and *Huge* v. *Long Hauling Company, Inc.*, 590 F.2d 457 (3d Cir. 1978).

Remarks of Rep. Thompson, Chairman of the Task Force on Welfare and Pension Plans and the House Subcommittee on Labor-Management Relations, *supra* (emphasis added).

This Court previously adopted the same policy in *Benedict Coal, supra.* In a collection action by the UMWA Fund Trustees, the Court refused to permit the employer to raise as a defense the alleged breach of the contract by striking miners. In so doing, the Court took note that the bargaining history did not "explicitly" protect Benedict Coal from claims by the Trustees, *id.* at 469; that, in view of the industry-wide nature

of the Funds, Benedict Coal's failure to pay would "fall in the first instance upon the employees and their families across the country," *id.*; and since royalty payments "are really another form of compensation to the employees," allowing Benedict Coal to default on its contribution requirement would violate Section 301(b) of the Taft-Hartley Act, which prevents collection of money judgments against individual union members. *Id.* at 469-70.

Similar to *Benedict Coal*, nothing in the legislative history of Section 8(e) "explicitly" provides that Congress meant to protect Kaiser[12] against claims *by the Trustees*. On the contrary, Congress last year indicated just the opposite. Remarks of Rep. Thompson, *supra*. Kaiser's failure to pay these royalties had an impact on over 70,000 retirees and their families across the country, when the UMWA 1950 Pension Plan ran out of assets and had to temporarily suspend pension payments for several months during the 1977-78 contract strike. 96 CONG. REC. S10,105 (daily ed. July 26, 1980) (remarks of Sen. Randolph).[13] Finally, Kaiser's failure to pay not only effectively decreased the employees' compensation, its failure to pay acts as a nonenforcement remedy and, thereby, effectively collects damages for the allegedly secondary activity from the individual employees and retirees, rather than from the union. *See Complete Auto Transit, Inc.* v. *Reis*, ___ U.S. ___, 49 U.S.L.W. 4473 (1981). When other remedies exist against the proper party, the union, this Court, as it did in *Benedict Coal*, should defer to the public policy of "simplifying delinquency collection" actions and not thrust plan trustees into the

[12] Kaiser mischaracterizes itself as the "neutral" employer in this matter. Kaiser, as a signatory to three separate agreements containing the challenged clause, is the primary, not the secondary employer, since the intent of the clause is to discourage Kaiser from deteriorating the work unit. *Dixie Mining (1971), supra.*

[13] Kaiser's statement (Brief at 4 n.4), that the 1978 and 1981 Agreements contain a guarantee of the benefits provision has no relevancy. The contract at issue, the 1974 Agreement, had no such guarantees. Even if it had, Kaiser's delinquency makes it more likely that benefits could not be increased or expanded.

thicket of Section 8(e) and antitrust litigations. Remarks of Rep. Thompson, *supra*.

B. The Purchase-Of-Coal Provision Requiring Retirement And Benefit Contributions Should Be Presumed Legal And Enforceable, Since The Proper Agency Has Not Rendered The Provision Void

When Congress created a new unfair labor practice in 1959 with the passage of Section 8(e) of the Labor-Management Reporting and Disclosure Act, it made no exception to the prevailing rule that, in the first instance, unfair labor practices must be litigated before the National Labor Relations Board. While recognizing that, in appropriate instances, contract provisions alleged to be unfair labor practices under this section could be temporarily enjoined by federal courts from enforcement, Congress left the initiation of that remedy solely to the NLRB. 29 U.S.C. §160(l) (1978). Had Congress intended to sanction the type of self-help engaged in by Kaiser, there would have been little need to have included Section 8(e) as one of the few unfair labor practices for which the Board *must* seek temporary relief under Section 10(l), pending administrative action.

By upholding the Court of Appeals herein, Kaiser is not divested of the remedies that Congress did provide — it simply must pursue those remedies in the proper forum, the NLRB. With that in mind, there is no reason for this Court to judicially sanction the new private right of invalidation sought by Kaiser, *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 755-56 (1947), or to effectively grant the status of a private attorney general on Kaiser. *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959).

Indeed, this case is not unlike an earlier royalty enforcement action by the UMWA Fund Trustees in the consolidated case of *Pennington* v. *UMWA*, *supra*. Therein, the employer not only raised the Sherman Act as a defense, but it claimed that the collective bargaining agreement was void in its entirety, based on alleged unfair labor practices. The Sixth Circuit, while finding that the UMWA had violated the Sher-

man Act (a finding later reversed),[14] relied in part on *Kelly* and enforced the Trustees' claim for uncollected royalties. The Court emphasized that an antitrust defense, even if the Trustees had themselves engaged in the conspiracy, did not bar the Trustees' collection action. 325 F.2d at 818.

The employer in *Pennington* also attempted to avoid its contractual obligation to contribute by claiming that the contract was void, since the UMWA allegedly unlawfully coerced the employer into signing the Agreement in violation of Section 8(b) of the NLRA. The Sixth Circuit, however, as should this Court, indicated that, absent a finding of such by the NLRB, the courts had no jurisdiction to entertain such a defense. 325 F.2d at 818, 819. *See Bruce's Juices, supra.*

The Sixth Circuit also indicated that, with respect to rights already accrued under the Agreement, as herein, that the *Trustees'* were not barred from collecting, citing *Kelly, supra,* and *Benedict Coal, supra.* Prior to hearing the antitrust issue in the consolidated case of *UMWA* v. *Pennington, supra,* this Court denied the employer's petition for certiorari on the royalty-collection issue, thus permitting enforcement of the Trustees' collection action. *Pennington* v. *Lewis, supra.*

As in *Pennington* v. *Lewis* and *Bruce's Juices,* this Court is not being asked to enforce a contract that has been found void by the proper forum.[15] Contracts are presumed to be legal, *Walsh* v. *Schlect,* 429 U.S. 401 (1977), unless they have been

[14] *UMWA* v. *Pennington,* 381 U.S. 657 (1965).

[15] The UMWA further contends that, Section 8(e) need not be read as voiding the *Trustees'* right to collect. *Benedict Coal, supra; Kelly, supra; Pennington* v. *UMWA, supra* at 818. Indeed, this Court, particularly in interpreting labor laws and Section 8(e), *National Woodwork Mfrs.* v. *NLRB,* 386 U.S. 612, 619 (1967), has advised that it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Connell, infra* at 628. In balancing the concerns expressed in Section 8(e) against the concern that (1) the defenses against the union not be applicable to action by

found illegal by the proper forum — the NLRB. The provision challenged herein must, therefore, be presumed legal on its face,[16] until the agency of competent jurisdiction, the NLRB, determines that the clause is void. Section 10(l) insures that premature enforcement of the provision may be prevented, if the NLRB has a "reasonable cause to believe" that the provision violates Section 8(e). Kaiser, however, chose not to file an unfair labor practice charge or seek injunctive relief from the NLRB, challenging the provision in the 1974, 1978, or now the 1981 Agreement which became effective on June 7, 1981.[17]

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trustees, *Benedict Coal, supra*, and (2) that the financial integrity of multiemployer pension plans should be encouraged, 29 U.S.C. §1001a (1981 Supp.); *NLRB* v. *Amax Coal Co.*, ___ U.S. ___, 49 U.S.L.W. 4880 (1981), this Court should uphold the decision below — particularly where the collective bargaining contract is completed and the substandard produced coal has already been purchased. *Pennington* v. *UMWA, supra* at 819.

However, the Court, in order to uphold the decision below, need not determine, as it did in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386-87 (1970); *accord Occidental Life Insurance Co.* v. *Pat Ryan & Assoc., Inc.*, 496 F.2d 1255, 1265-66 (4th Cir. 1974) *cert. denied*, 419 U.S. 1023 (1974), that (as to the Trustees) the term "void" in the statute was not absolute. As in *Bruce's Juices, supra* at 745-46, the Court need only presume legality and decline to entertain the illegality defense, because the appropriate tribunal — there the Federal Trade Commission, here the NLRB — has not had its jurisdiction invoked and, therefore, has not "voided" the challenged provision.

[16] *See Dixie Mining (1971), supra*, which upheld an earlier purchased-coal provision requiring double royalties on purchased coal.

[17] Without conceding the point, the UMWA suggests that such a charge by Kaiser might not be dismissed, if, as it claims, the provision is being applied illegally to Kaiser, a factual situation that may not have existed in *Consolidation Coal Co.*, NLRB Case No. 6-CE-17, *supra*. Even if the NLRB refuses to issue a complaint, Kaiser's position is not unlike a discharged employee who may believe that he or she has a meritorious unfair labor practice case, but the NLRB's General Counsel refuses to issue a complaint. *cf. Bruce's Juices, supra at 746.*

Having chosen not to invoke the proper forum, Kaiser now urges this Court to unnecessarily create another exception to the preemption doctrine. While the UMWA concedes that there are some exceptions to that doctrine, they are either created by statute, *e.g.*, 29 U.S.C. § 164(b) (1978), or ... e exceptions touch areas primarily of local interest. Neither rationale justifies the exception for which Kaiser now argues. In particular, the existence of Section 10(l) argues strongly against creation of another exception.[18]

Kaiser is not content to carve out just another exception to the primary jurisdiction rules. Its reading of *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975), would have the general rule of primary NLRB jurisdiction swallowed by its exception. This Court did not blanketedly hold, as suggested by Kaiser, that courts always had jurisdiction to determine whether a clause violated Section 8(e).[19] With little elaboration, the Court only indicated that "*federal* courts *may* decide labor law questions that emerge as collateral issues in suits brought under independent *federal* remedies, including the antitrust laws." *Connell* at 627 (emphasis added).[20]

In *Connell*, the primary issue relevant to this action involved statutory construction, not factual findings — do the words "an employer in the construction industry" mean any employer or just employers within the context of a collective bargaining relationship with the union. There was little need, unlike here, to engage in extensive and complicated factual

[18] In the event that a Section 10(l) order is not granted by a court, but the Board subsequently invalidates the provision, Kaiser's rights should still not be prejudiced 29 U.S.C. §1103(c)(2)(A)(ii) (1981 Supp.).

[19] Of course, after the NLRB has had an opportunity to consider the issue, federal courts may exercise limited review of the Board action.

[20] *Connell* apparently does not grant such jurisdiction on unfair labor practice issues to *state* courts. However, state courts frequently hear pension contribution enforcement actions.

findings, involving unit determinations, the negotiators' intentions, and the primary, secondary, or incidental effects of the provision — matters best left, in the first instance, to the Board. *International Longshoremen's Association, supra.* Thus, *Connell,* in permitting the court to statutorily construe Section 8(e) itself, only lightly stepped over the doctrine of primacy.

To further understand *Connell,* one must also look to the cases cited. *Id.* at 626 n.3. The UMWA asserts that the three tests set forth by the Court in *Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 684-88 (1965), the primary case relied on by the *Connell* court, are the most appropriate for application here. Furthermore, we suggest that all three tests must be met before the Court should exercise its jurisdiction.[21]

In *Connell,* as well as *Jewel Tea,* this Court recognized that the nature of the action was important to resolution of the jurisdiction issue. In those cases, a party to the contract, the union, in defending itself against an antitrust action, was contending that the challenged contractual provision was either legal, or that the issue of legality should, in the first instance, be left to the Board. Unlike here, the Court recognized, though, that it would be rare for a *union* to challenge before the NLRB the validity of a clause that the union was also seeking to enforce. In *Connell,* one could not expect the Plumbers Union to have filed a Section 8(e) charge to test the validty of the contract. Similarly, in *Jewel Tea,* there was not a realistic expectation of an available procedure for obtaining Board

[21] The Court, while primarily relying on *Jewel Tea,* also cited *Vaca* v. *Sipes,* 386 U.S. 171 (1967) and *Smith* v. *Evening News Ass'n,* 371 U.S. 195 (1962) for comparison. Neither of those two cases resolve the issue here. *Vaca,* in refusing to defer unfair representation issues to the Board, pointedly noted that this court-developed doctrine was only belatedly adopted by the Board. *Smith* only stands for the proposition that activities which constitute contract breaches, as well as unfair labor practices, are cognizable by the courts under § 301 of the Labor Management Relations of 1947, 29 U.S.C. § 185 (1978). Here, it is not a contract breach, but the contract itself, that is alleged to be the unfair labor practice.

determination.[22] *Id.* at 648. Unlike the defendants in *Connell* and *Jewel Tea*, however, the defendant in Kaiser could realistically have been expected to exercise its administrative remedies before the Board, including injunctive relief.[23] It chose not to do so.[24]

In *Jewel Tea*, the Court also took note that the antitrust action, when first initiated by the employer, only clearly alleged a conspiracy between the union and one set of bargaining units to impose certain terms on the rest of the units. It was only later that it became evident, in addition to the conspiracy theory, resolution of another major issue would be necessary — whether the marketing-hours issue was "a condition of employment," so as to invoke the labor exemption. Thus, deferral to the Board may have unnecessarily protracted the litigation. From the outset here, there was never any doubt — Kaiser, from the time it entered into the contract, considered the provision as violative of Section 8(e). Thus, Kaiser fails to meet two of the *Jewel Tea* tests. And as we will show, Kaiser could not always meet the third test.

[22] In *Jewel Tea*, there could not have been a Board determination, since an unfair labor practice charging a refusal to bargain would have been necessary to invoke the Board's jurisdiction. There was no refusal to bargain, since the challenged agreement resulted from bargaining, rather than the refusal to bargain.

[23] While the Court showed some concern with the six-month time limit in *Jewel Tea*, we suggest that it was unlikely, since a contract was reached, that there would have been a reaffirmation of a refusal to bargain, thus extending the Section 10(b) time limits. However, such reaffirmation is much more likely with a Section 8(e) unfair labor practice. As was pointed out earlier, at no time, has Kaiser filed 8(e) charges seeking invalidation of the challenged provision in the 1974, 1978, or 1981 Agreements.

[24] In refusing to entertain a federal antitrust defense to a contract enforcement action, one court has noted that, as Kaiser, the aggrieved party did not avail itself of injunctive relief pursuant to 15 U.S.C. § 26 (1978). *Union Oil Co.* v. *Chandler*, 4 Cal.App.3d 716, 728, 84 Cal. Rptr. 756, 764 (1970).

C. Permitting Employers To Raise A Section 8(e) Defense In Trustee Enforcement Actions Might Impermissibly Extend Jurisdiction Over Federal Unfair Labor Practices To State Courts

Unlike *Connell* and *Jewel Tea*, which were federal antitrust actions, which can only be brought in federal courts, 15 U.S.C. § 4, this is a contract enforcement action that could have also been brought in a state court. Thus, while federal courts may have experience in interpreting federal labor statutes, the remaining test in *Jewel Tea*, *supra* at 647, the same cannot be said for state courts, which have no jurisdiction to decide unfair labor practice issues, *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684, 693 (8th Cir. 1979), unless the NLRB specifically cedes jurisdiction to them, 29 U.S.C. §164(c)(2). It is, however, prevented from doing that here. 29 U.S.C. §164(c)(1).[25]

Should this Court rule in Kaiser's favor, it will face in this or a subsequent case the same issues in the context of a state court action. To permit interpretation of Section 8(e) by state courts will thwart congressional intent. To prohibit such defenses in state courts, but permit them in federal courts, goes against the congressional policy to encourage simplified federal collection actions. Remarks of Rep. Thompson, *supra*. By upholding the Court of Appeals, the Court will avoid this anomaly.

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[25] The Landrum-Griffin Conference Committee, after extended debate in the Congress, specifically rejected the Senate provision which permitted state courts to exercise jurisdiction over *all* Board cases. The Committee, while permitting the Board to cede jurisdiction in certain circumstances, prohibited the Board from ceding jurisdiction on those matters over which it had already exerted jurisdiction, such as the matters herein. *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* at 940-41.

II. KAISER HAS NOT ALLEGED FACTS SUFFICIENT TO REBUT THE PRESUMED LEGALITY OF THE PURCHASE-OF-COAL PROVISION

The NLRB has already determined in a Section 8(e) proceeding that the more restrictive predecessor to the purchased-coal provision, the 80-cent clause, was legal on its face. *Dixie Mining (1971), supra.* In order for Kaiser to prevail on a summary motion, it must allege facts that clearly show that the provision is illegal in its application generally. *Id.* at 754. Kaiser has failed to do this.[26]

In determining whether an otherwise lawful union standards provision has been unlawfully applied, the NLRB compares the *total* labor *costs* of subcontractors with the *total* labor *costs* of the primary unit. Indeed, comparison of specific *benefits*, rather than costs, may render the provision unlawful. *Associated General Contractors & Teamsters*, 227 N.L.R.B. 269-73 (1976). The purchased-coal clause is intended to approximately equalize the differences in the total costs of wage and fringe benefits between signatory and nonsignatory employers, a lawful objective. *Dixie Mining (1971), supra.* However, Kaiser's affidavits only compare the *level* of employee *benefits* between Kaiser and Mid-Continent. C.A.J.A. ¶ 12 332. This distinction between costs and benefits is particularly important when comparing employers with single employer plans to those with multiemployer plans, in which there are a greater percentage of participants vesting, thus greatly increasing the costs to the plan for similar benefit levels.

Indeed, one government study has shown that costs were 90-cents per employee-working-hour for coal miners under the UMWA multiemployer plan, while costs for similar benefits under non-UMWA (primarily single employer) plans were only 4-cents per employee-working-hour.[27] Thus, the eco-

[26] See also n. 31, *infra.*

[27] "Employee Compensation and Payroll Hours, Bituminous Coal Mining 1969," Report 399, Bureau of Labor Statistics, U.S. Department of Labor, (C.A.J.A. 594-99); Bethel Affidavit, ¶ 29 (C.A.J.A. 573). Kaiser apparently concedes that UMWA-produced coal does cost more. Brief at 4 n.5.

nomic incentive to purchase coal, rather than produce it within the unit, still remains, even if single employer benefit levels are the same as those under the UMWA Agreement. The purchased-coal clause lawfully removes that incentive.[28] It is an effective, efficient, and administratively manageable[29] work preservation provision, which lawfully makes a "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage (and benefit) structure established by the collective bargaining contract." *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 212 (1964).[30]

[28] The 80-cent clause was shown to have a work-preservation intent and effect. *Dixie Mining*, (1971); *Riverton Coal Co.* v. *UMWA*, 79 L.R.R.M. 2348, 2352, ¶ 47 2360 (S.D. Ohio 1970), *rev'd*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972). The rationale of the Sixth Circuit, in reversing the district court, should now be seriously questioned. The Sixth Circuit, while relying on other evidence in the record, criticized the 80-cent clause as not being work-preservative, since Riverton Coal Co. could close all of its mines and purchase the coal elsewhere without violating the provision — an action now sanctioned by this Court. *First National Maintenance Corp.* v. *NLRB*, ___ U.S. ___, 49 U.S.L.W. 4769(1981). *But that can happen under any lawful union standards provision.*

[29] It is very difficult administratively for the UMWA or the Trustees to monitor even this provision, since accurate information is not always readily available on coal purchases. They must rely on good faith reporting by the employers. And, in view of the fungible nature of the product, neither the UMWA nor the Trustees have the practical means to determine the characteristics of the coal. *UMWA (BCOA)*, 179 N.L.R.B. 479, 480 (1969). Indeed, steam coals used by utilities and metallurgical coals used by steel companies are often blends of various grades of coal. C.A.J.A. 643-46.

[30] In determining whether the purchased-coal provision is lawful under Section 8(e), the Board must examine "all the surrounding circumstances," including the economic characteristics of the industry. *National Woodwork, supra* at 644 n.38. Application of this test, particularly in light of *Dixie Mining (1971), supra*, and the elimination of the double royalty provision, should result in this provision being found lawful. The threat of displacement or the loss of job opportunities for UMWA coal miners from the purchase of coal from sub-

Kaiser has not alleged facts to show that the royalty overcompensates for *costs* to support its argument that the purchased-coal provision is unlawful. This further supports the ruling below.

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standard mines, from "paper" corporate transfers and runaway operators, and from lessor-lessee transactions by a signatory to a nonsignatory employer (while still retaining substantial control over the mining of coal), is more than just remote.

Indeed, the federal government has long recognized the vicissitudes of the coal industry. In 1943, the National War Labor Board, for instance, directed that each UMWA agreement contain a provision prohibiting leasing for the purpose of subterfuge. *Riverton Coal Co.* v. *UMWA, supra* at 2352. In passing the Black Lung acts of 1977, Pub. L. No. 95-239 and Pub. L. No. 95-227, Congress frequently expressed its concern with coal operators who avoided their black lung responsibilities through various corporate transactions. *See, e.g. Black Lung Reform Act and Black Lung Benefits Revenue Act of 1977,* Committee on Education and Labor, House of Representatives, Committee Print, Leg. His., 96 Cong. (Feb. 1979) at 348, 349; 20 C.F.R. §725.491(b)(2), which makes lessors responsible for payment, in appropriate circumstances, for black lung benefits due to employees of lessees (see the Secretary's justification for this rule at 43 Fed. Reg. 36,803 (August 18, 1978).

Congress recently expressed its concern that various corporate transactions in the coal industry could financially harm the UMWA's pension funds. *See, e.g.*, 96 CONG. REC. S10,105 (daily ed. July 29, 1980) (remarks of Sen. Randolph). The strongest withdrawal liability provisions in the entire Act were directed at the coal industry. *Id.*, 29 U.S.C. §§1391(d)(2) and 1396 (1981 Supp.). Indeed, the BCOA recognized that differentials in pension liabilities "would clearly be an incentive for employers already in a plan to seek ways . . ." such as purchasing substandard-produced, less-costly coal ". . . to gain the preferential treatment." Hearings on H.R. 3904, the Multiemployer Pension Plan Amendments Act of 1979, before the Task Force on Welfare and Pension Plans, Committee on Education and Labor, House of Representatives, 96 Cong., 1st Sess. (June 5 and 7, 1979) at 1574-75.

III. A FEDERAL ANTITRUST DEFENSE MAY NOT BE RAISED BY KAISER IN A HEALTH AND RETIREMENT TRUSTEES' ENFORCEMENT ACTION, WHETHER BROUGHT IN FEDERAL OR STATE COURT.

This Court has not looked favorably upon the defense of illegality in a contract enforcement action based on violation of the Sherman Antitrust Act. As here, this is particularly so when the contract has been fulfilled by the other party. *Kelly, supra; Bruce's Juices, supra.*[31]

Even if one is to accept Kaiser's reading of this Court's decision in *Kelly* — which the UMWA does not do — such interpretation would still not justify nonenforcement of the pur-

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[31] There is no dispute that Kaiser's employees carried out their obligations under the collective bargaining contract. Kaiser argues that the Court's concern in *Kelly* at 520-21, about "preventing people from getting other people's property for nothing when they purport to be buying it . . ." is not applicable here, since the pension and health contributions are not deferred compensation. That argument has long ago been rejected. *Benedict Coal, supra; Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 253 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), *Davis* v. *Alabama Power Co.*, 383 F.Supp. 880, 890-91 (N.D. Ala. 1974) *citing Ball* v. *Victor Adding Machine Co.*, 236 F.2d 170, 173, 174 (5th Cir. 1956).

Kaiser concedes, as it must, that the issue of the Trustees' knowledge of whether Kaiser was or was not purchasing coal is immaterial J.A.C.A. 294 n.1. Kaiser's affidavits only allege that past UMWA officials, (including International President Tony Boyle, who negotiated the 1968 and 1971 Agreements and who was subsequently replaced, as were the Trustees, when Arnold Miller won the presidency in 1973) knew of Kaiser's purchases. Kaiser's affidavits do not indicate any knowledge by the newly-installed UMWA officers or by the Trustees of Kaiser's purchases during the term of the 1974 Agreement. Furthermore, Article XX, Section (d)(5) of the 1974 Agreement was also violated by Kaiser, when it refused to report its purchased coal, as it was required to do. Kaiser also failed to respond to the Trustees' questionnaire seeking information from all

chase-of-coal clause.[32] In applying Kaiser's rationale here, requiring payment of royalties on coal not produced by Kaiser is an "intelligible economic transaction" not in and of itself an unlawful agreement. *Walsh* v. *Schlect, supra.* Since health and retirement contributions are so "intimately related to wages, hours and working conditions," *Jewel Tea, supra* at 689, the purchased-coal provision, absent a conspiracy, is not challengeable in an antitrust action. *Id.; Bruce's Juices, supra* at 689-90.[33] Just as with the nondelivery agreement in *Kelly,* it is only the nonpayment of royalties by Kaiser on purchased coal to which royalties have already been paid that could even conceivably characterize the transaction as illegal.[34] Since Kaiser purchased little or no coal on which royalties had already been paid, enforcement of the Trustees' action here could "hardly be said to enforce a violation of the Act." *Kelly* at 521.

The Court has shown its reluctance to deny enforcement of a contract, even in the face of an antitrust defense, and even

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the signatory employers regarding their purchase or nonpurchase of coal. Therefore, Kaiser is not in a good position to claim that the Trustees have sat on their rights until the expiration of the Agreement.

[32] The UMWA relies on the Trustees' interpretation of *Kelly.*

[33] Kaiser's affidavits do not "clearly" show as they must, Norris-LaGuardia Act, 29 U.S.C. §106 (1978), that the newly-elected UMWA agents engaged in a conspiracy with Kaiser, as a member of BCOA, in the *1974* negotiations to restrict the UMWA's freedom elsewhere. The NLRB, on remand from the Court of Appeals on the issue of "intent," found that the purchased coal provision was intended as a work-preservation tool. *Dixie Mining (1971), supra;* see n.36 *infra.* Thus, the antitrust defense, which Kaiser did not raise in its motion for summary judgment C.A.J.A. at 292 n.2, even if permitted, has not been sufficiently raised by Kaiser to withstand the Trustees' summary motion. *Berggren* v. *Sun Oil Co.,* 79 F.R.D. 87, 89-90 (E.D. Wis. 1978).

[34] If the royalty were *again* required for coal purchased on which the royalty had *already* been paid, one might argue that the provision violated Section 8(e), since it would "penalize" Kaiser for doing business with other UMWA-organized employers.

when the enforced contract allegedly lessens competition in violation of the Robinson-Patman Act. *Bruce's Juices, supra* at 758. (Murphy, J. dissenting). The UMWA asserts that the Court's policy of enforcing executed contracts, as expressed in *Kelly* and *Bruice's Juices*, despite the defense of illegality under the antitrust laws, is even more appropriate in an action by health and welfare trustees. *Cf. Benedict Coal, supra;* remarks of Rep. Thompson, *supra*. Otherwise, the Trustees, rather than the appropriate party, the UMWA, would be forced into litigating issues that would arise from an antitrust or Section 8(e) defense, that are more properly left to litigation by the UMWA.[35]

Finally, it should be pointed out that, unlike federal courts which have experience in interpreting the antitrust and federal labor laws, *Jewel Tea, supra* at 686, state courts certainly do not have such expertise.[36] Yet, actions on a contract to enforce pension contribution requirements have been fre-

[35] For instance, the determination of the appropriate unit for which work is being preserved, an often difficult factual and legal issue, particularly in multiemployer bargaining situations, *Dixie Mining, (1971), supra;* Note, *Secondary Boycotts and Work Preservation*, 57 Va. L. Rev. 1280, 1291-94 (1971), is best left to litigation by the union before the NLRB.

[36] Determination of issues arising under the federal antitrust laws are not within the jurisdiction of state courts, 15 U.S.C. § 4; *Freeman* v. *Bee Machine Co.*, 319 U.S. 448, 452 n.6 (1943); *General Investment Co.* v. *Lake Shore & Michigan Southern Railway Co.*, 260 U.S. 261, 287 (1922); *see Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 271 (1937); whether by way of attack or defense. *Miller* v. *Granados*, 529 F.2d 393, 395 (5th Cir. 1976); *Vaughn Co., Ltd.* v. *Saul*, 143 Ga. App. 74, 237 S.E. 2d 622 (1977); *Azalea Drive-In Theatre* v. *Sargoy*, 215 Va. 714, 214 S.E.2d 131, 135 (1975), *cert. denied* 423 U.S. 940 (1975); *Appalachian Power Co.* v. *Regional Properties, Inc.*, 364 F.Supp. 1273, 1278 n.11 (D.Va. 1973); *Union Oil Co.* v. *Chandler*, 4 Cal. App. 3d 716, 84 Cal.Rptr. 756, 764 (1970); *General Talking Pictures Corp.* v. *DeMarce*, 203 Minn. 28, 279 N.W. 750 (1938); *but see Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir. 1955).

quently brought in state courts. If Kaiser's position is accepted, this Court may subsequently have to extend the same jurisdiction to state courts for consistency purposes. Otherwise, trustees will be encouraged to bring all enforcement actions in state courts, a result contrary to congressional intent to encourage the development of a national private pension policy. This Court can and should avoid this result by affirming the decision below.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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(202) 842-7330
Counsel for International Union, United Mine Workers of America, Amicus Curiae

**Counsel of Record*

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1966

UNITED STATES STEEL CORPORATION,

Plaintiff.

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL.,

Defendants.

ORDER
Filed October 5, 1977

JAMES F. DAVEY, Clerk

Upon consideration of the pleadings, the cross motions for summary judgment which have been filed by Plaintiff, by Defendant International Union, United Mine Workers of America ("UMWA"), and by Defendants Davis, Huge, and Dean ("Defendant Trustees"), the affidavits, the parties' "Stipulation of Issues, Undisputed Facts and Disputed Facts" and exhibits thereto, and the parties' memoranda and oral argument; it appearing to the Court that there are no material facts in dispute with respect to whether or not the so-called "purchase-of-coal" provision of Section (d) of Article XX of the National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement") violates Section 1 of the Sherman Act, 15 U.S.C. §1 or any other antitrust law; as stated by this Court at the hearing on May 26, 1977, it appearing further that judgment should be entered dismissing Plaintiff's complaint insofar as it challenges the "purchase-of-coal" provision of Section (d) of Article XX of the 1974 Agreement as violating the antitrust laws; it appearing further that the parties have agreed that the remaining portion of Plaintiff's complaint, which challenges the "purchase-of-coal clause" as violating Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e),

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ORDER
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Upon consideration of the pleadings, the cross motions for summary judgment which have been filed by Plaintiff, by Defendant International Union, United Mine Workers of America ("UMWA"), and by Defendants Davis, Huge, and Dean ("Defendant Trustees"), the affidavits, the parties' "Stipulation of Issues, Undisputed Facts and Disputed Facts" and exhibits thereto, and the parties' memoranda and oral argument; it appearing to the Court that there are no material facts in dispute with respect to whether or not the so-called "purchase-of-coal" provision of Section (d) of Article XX of the National Bituminous Coal Wage Agreement of 1974 (the "1974 Agreement") violates Section 1 of the Sherman Act, 15 U.S.C. §1 or any other antitrust law; as stated by this Court at the hearing on May 26, 1977, it appearing further that judgment should be entered dismissing Plaintiff's complaint insofar as it challenges the "purchase-of-coal" provision of Section (d) of Article XX of the 1974 Agreement as violating the antitrust laws; it appearing further that the parties have agreed that the remaining portion of Plaintiff's complaint, which challenges the "purchase-of-coal clause" as violating Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e),

should be dismissed with prejudice; and it appearing further that the parties have agreed on condition to dismiss the Defendant Trustees' counterclaim with prejudice;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Section (d) of Article XX of the National Bituminous Coal Wage Agreement of 1974 does not violate Section 1 of the Sherman Act, 15 U.S.C. §1, or any other antitrust law; and

2. That Plaintiff's complaint is hereby dismissed with prejudice; and

3. That Defendant Trustees' counterclaim is hereby dismissed with prejudice, conditioned upon payment by Plaintiff to the Defendant Trustees of all royalties due under the purchase-of-coal clause of the 1974 Agreement on coal procured or acquired by Plaintiff commencing December 6, 1974, and continuing through the term of said Agreement.

Dated: October 5, 1977 /s/ CHARLES R. RICHEY
United States District Judge

Seen and Approved:

/s/ PHILLIP J. SHEEHE
D. B. King
Phillip J. Sheehe
B. M. Tennant
Burt A. Braverman
Attorneys for Plaintiff

/s/ WILLARD P. OWENS
Willard P. Owens
Attorney for Defendant
United Mine Workers of America

/s/ STEPHEN J. POLLAK
Stephen J. Pollak
Attorney for Defendants
Davis, Huge and Dean

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1966

UNITED STATES STEEL CORPORATION,

Plaintiff.

v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL.,

Defendants.

MEMORANDUM OF AGREEMENT

Harry Huge, C. W. Davis, and Paul R. Dean (hereinafter the "Trustees"), the United Mine Workers of America (hereinafter "UMWA") and U.S. Steel Corporation (hereinafter "U.S. Steel") hereby agree to a disposition of this action on the following terms:

1. The settlement is conditioned upon the entry of the judgment attached hereto, or one which does not differ substantively therefrom. None of the parties will appeal from the judgment so entered.

2. Upon entry of the judgment, U.S. Steel will commence and continue paying royalties on coal procured or acquired after September 30, 1977, in accordance with the purchase-of-coal clause of Article XX(d) of the National Bituminous Coal Wage Agreement of 1974 ("1974 Agreement").

3. U.S. Steel agrees that during negotiations with the UMWA for any new contract to succeed the 1974 Agreement, including multiemployer contracts, it will not raise any legal objections to the inclusion in the new contract or contracts of a purchase-of-coal clause, substantively the same as the clause in the 1974 Agreement, and that it will not challenge the legality of any such purchase-of-coal clause agreed to as part of any such new contract. This agreement does not, however,

preclude U.S. Steel from objecting to such a clause on other, non-legal, grounds during the collective bargaining process.

4. U.S. Steel agrees to pay to the Trustees in accordance with the purchase-of-coal clause of the 1974 Agreement all royalties due on coal procured or acquired from December 6, 1974 through September 30, 1977. This obligation shall be limited to the tonnage royalty specified in the purchase-of-coal clause. As shown by the attached Schedule, U.S. Steel estimates that the amount of such royalties due on coal procured or acquired from December 6, 1974, through August 31, 1977, is $9,707,594.00. U.S. Steel will pay that amount to the Trustees not later than five (5) working days after entry of judgment. U.S. Steel will estimate the amount of such royalties due on coal procured or acquired from September 1 through September 30, 1977, and pay that amount to the Trustees when it pays the Trustees royalties due for coal produced by U.S. Steel during September 1977. If it is later determined by examination of U.S. Steel's records that the amount of all royalties due on coal procured or acquired from December 6, 1974 through September 30, 1977 is more or less than the amounts paid by U.S. Steel, appropriate adjustments will be made between the parties.

5. Each party shall bear its own costs and expenses of this litigation.

Dated: October 3, 1977 /s/ PHILLIP J. SHEEHE
D. B. King
B. M. Tennant
Phillip J. Sheehe
Counsel for U.S. Steel
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dated: October 4, 1977 /s/ WILLARD P. OWENS
Harrison Combs
Willard P. Owens
Counsel for UMWA
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Dated: October 5, 1977 /s/ STEPHEN J. POLLAK
Stephen J. Pollak
Ralph J. Moore
Wendy S. White
Counsel for Trustees
734 Fifteenth Street, N.W.
Washington, D.C. 20005